



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: J & J Maintenance, Inc.
File: B-239035
Date: July 16, 1990

Donald E. Barnhill, Esq., and Joan K. Fiorino, Esq., East & Barnhill, for the protester.
Dave Jordan, Department of Transportation, for the agency.
Jeanne White Isrin, Esq., David Ashen, Esq., and
John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Performance bond requirement in solicitation issued as part of a cost comparison pursuant to Office of Management and Budget Circular No. A-76, for facilities maintenance at academic institution housing over 1,000 personnel, is unobjectionable where substantial government-furnished property will be provided to the contractor for performance of the contract and the services to be performed are critical to the continuous operation of the facility.

DECISION

J & J Maintenance, Inc. protests the requirement for a performance bond in request for proposals (RFP) No. DTCG39-90-R-QEX001, issued by the United States Coast Guard for facilities maintenance at the Coast Guard Academy, New London, Connecticut. We deny the protest.

The solicitation, issued as part of a cost comparison pursuant to Office of Management and Budget (OMB) Circular No. A-76, requests proposals to maintain and repair all electrical systems, heating plants and air compressors, sewer systems, food services equipment, water storage and distribution systems, swimming pools, air conditioning and refrigeration, elevators, buildings, electronic systems, and to furnish grounds maintenance, refuse collection, pest control, custodial services, fire protection, and special events support. The RFP requires an annual performance bond in the amount of 100 percent of the original contract price and a payment bond in the amount of \$2,500,000. The

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Coast Guard has determined that the requirement for a performance bond is necessary to protect the government's interests because substantial government property (valued at \$1,625,785) will be furnished to the contractor for performance of the contract, and substantial damages could result if the Academy's facilities, property, and structures, with an estimated value of \$250 million, are not properly maintained. The agency also has specifically found that the bond is necessary to assure the continuous operation of the Coast Guard Academy, including operations in support of the 1,000 cadet, enlisted, and officer personnel in residence at the Academy.

J & J protests that the performance bond requirement is unreasonable and should either be eliminated or reduced to the value of the government-furnished property (\$1,625,785) under the contemplated contract. It argues that the Federal Acquisition Regulation (FAR) does not allow a performance bond where the work to be performed consists predominantly of services. J & J also contends that much of the government-furnished property to be provided to the contractor is of a type that will be replaced throughout the term of the contract and therefore should not require a bond. J & J maintains that since the performance bond is improper, the requirement for a payment bond is improper as well.

Although a bond requirement may result in a restriction of competition, it nevertheless can be a necessary and proper means of securing to the government the fulfillment of the contractor's obligation under the contract in appropriate situations. Govern Serv., Inc., 68 Comp. Gen. 204 (1989), 89-1 CPD ¶ 92. While generally contracting agencies should not require performance bonds for other than construction contracts, the FAR recognizes that there are situations in which bonds may be necessary for nonconstruction contracts in order to protect the government's interests. FAR §§ 28.103-1 and 28.103-2. In reviewing a challenge to the imposition of a bonding requirement, we look to see if the requirement was reasonable and was imposed in good faith; the protester bears the burden of establishing unreasonableness or bad faith. See IBI Sec., Inc., B-235857, Sept. 27, 1989, 89-2 CPD ¶ 277.

We find that the Coast Guard reasonably imposed the bonding requirement. First, the FAR specifically provides that a performance bond may be appropriate for nonconstruction contracts where, as here, government property will be used by the contractor for performance of the contract. FAR § 28.103-2(a)(1). The possibility raised by the protester that some of the government-furnished property may be

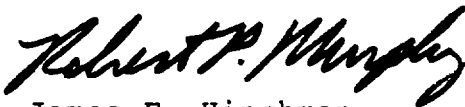
replaced during the course of the contract in no way diminishes the government's interest in protecting the property during its remaining useful life or until consumed. See Intermodal Management, Ltd., B-234108, Apr. 20, 1989, 89-1 CPD ¶ 394 (performance bond is appropriate to protect the government's interest in warehouse inventory, medical supplies, and pharmaceuticals). In addition, bonds may be required where continuous operation of critically-needed services is absolutely necessary. See, e.g., IBI Sec., Inc., B-235857, supra (security guard services); Aspen Cleaning Corp., B-233983, Mar. 21, 1989, 89-1 CPD ¶ 289 (janitorial services); Govern Serv., Inc., 68 Comp. Gen. 204, supra (hospital laundry services). Here, the contractor will be responsible for virtually all maintenance and facility operating services at the Academy; according to the agency, the contractor's failure to properly perform such services would result in a significant unacceptable impact on the Academy's ability to operate and carry out its mission. Bonding is justified in these circumstances.

Although J & J also questions the amount of the required bond, FAR § 28.102-2(a)(1) specifically provides that the penal amount of the performance bond shall be 100 percent of the original contract price unless the contracting officer determines that a lesser amount would be adequate to protect the government. In view of the necessity for continued performance of services essential to the operation of a major installation, we find nothing inherently unreasonable in the agency's determination to require a 100 percent performance bond. See generally International Technology Corp., B-238646, June 8, 1990, 90-1 CPD ¶ _____. Further, as we have found the requirement for a performance bond proper, and J & J has not claimed that the payment bond is not in the government's interest, there is no basis on which to question the propriety of the payment bond. See FAR § 28.103-3(a).

J & J argues that a bonding requirement in the context of an A-76 cost comparison creates an unfair advantage for the government because it does not need to include bonding costs in its in-house cost estimate. While the government and offerors must compete on the same statement of work, they may be subject to different legal requirements in obtaining or performing the contract that may cause the commercial firms to suffer a cost disadvantage. Intermodal Management, Ltd., B-234108, supra; Executive-Suite Servs., Inc., B-212416, May 29, 1984, 84-1 CPD ¶ 577. The fact that the government may have a cost advantage due to its self-insurance capability does not make the cost comparison defective. Eara-King Photographic, Inc., B-226408.2, Aug. 20, 1987, 87-2 CPD ¶ 184. Nothing limits the

government's right to require bonds in cost-comparison situations to the same extent as authorized in other procurements. Executive-Suite Servs., Inc., B-212416, supra.

The protest is denied.


for James F. Hinchman
General Counsel